UNITED STATES OF AMERICA

NATIONAL LABOR RELATIONS BOARD

In the Matter of:	:		
	:		
Wilkes-Barre Hospital Company, LLC	:		
	:	Case Nos.	04-CA-111130
Respondent	:		04-CA-121027
	:		04-CA-123748
and	:		
	:		
Pennsylvania Association of Staff Nurses	:		
and Allied Professionals, AFL-CIO	:		
	:		
Charging Party	:		
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BRIEF OF CHARGING PARTY IN OPPOSITION TO RESPONDENT'S EXCEPTIONS TO THE DECISION OF ADMINISTRATIVE LAW JUDGE

Markowitz & Richman
BY:JONATHAN WALTERS, ESQUIRE
Markowitz & Richman
123 S. Broad Street
Suite 2020
Philadelphia, PA 19109
jwalters@markowitzandrichman.com
Counsel for Charging Party

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The Charging Party, the Pennsylvania Association of Staff Nurses and Allied Professionals, AFL-CIO ("Union" or "PASNAP"), by and through its attorneys, Markowitz and Richman, pursuant to Section 102.46(d)(1) of the Rules and Regulations of the National Labor Relations Board ("NLRB" or "Board") submits this brief in opposition to the Exceptions filed by the Respondent-Employer, Wilkes Barre Hospital Company, LLC ("Hospital" or "Employer") to the November 17, 2014 Proposed Decision and Order ("PDO") of Administrative Law Judge Susan Flynn ("ALJ") in the above-referenced matter.

I. STATEMENT OF FACTS

Wilkes-Barre Hospital ("Hospital" or "Employer") is a for-profit an acute care hospital located in Wilkes Barre-Pennsylvania. Prior to 2009, the Hospital had been an independent facility. *E.g.*, Tr. 10. However, in 2009, the Hospital was acquired by Community Health Systems ("CHS). RX8,[1] Prior to its acquisition, Wyoming Valley Nurses Association/PASNAP[2] has represented the nurses employed by the Hospital since at least 2000. Tr. 48. The bargaining unit consists of 450 nurses at Hospital facilities. Tr. 43; GC Exh. 2, 1-2. Prior to CHS's acquisition of the Hospital, PASNAP and the Hospital had entered a series of collective bargaining agreements.

The collective bargaining agreement ("2005 Agreement") in existence at the time of the Hospital's acquisition by CHS in 2009 became effective in 2005 and had not been scheduled to expire until January 26, 2011. Tr. 269; R. Exh. 7. Article 25 of that 2005 Agreement provided for two distinct categories of pay increase: (1) "[s]cale increases according to longevity," which were "[w]age minimums...based upon the employee's length of continuous service as a registered nurse" and which were "to become due only upon January 27th of the year following the employee's anniversary date"; and (2) across-the-board fixed percentage increases ("GWIs"), , which first raised all employees to at least a specified minimum wage and then granted all employees an identical percentage increase at distinct specified dates during the life of the contract. R. Exh. 7. Thus, the 2005 Agreement granted employees specified percentage wage increases on particular dates, and also provided for increases in the minimum wage based on

[1] All references to Exhibits introduced by the Counsel for the General Counsel at the hearings conducted in this matter on July 14-16, 2015 in Philadelphia, Pennsylvania before the ALJ shall be designated as "GC Exh" followed by the number of the exhibit(s) to which specific reference is made. References to exhibits introduced by the Hospital shall be designated as "R. Exh." followed by the specific exhibit numbers to which reference is made. Finally, all references to the transcript of the hearing conducted in this matter are designated as "Tr." followed by the relevant page number(s).

[2] The Charging Party, PASNAP, is the labor organization with which the Wyoming Valley Nurses is affiliated.

years of service. *See id.* The 2005 Agreement treated these two types of increases as separate, unrelated matters. *See id.*

Upon its acquisition of the Hospital in April 2009, CHS and PASNAP negotiated a Memorandum of Agreement ("MOA") with PASNAP that altered to a minor degree the 2005 Agreement. *See* R. Exh. 8. Although the MOA made some modifications to the terms of the 2005 Agreement, for the most part the MOA incorporated the terms of that agreement unaltered.[3] *See id.*, p. 4, Section 3 ("except as explicitly provided for otherwise in this MOA, the text of the [2005 Agreement] shall be incorporated in this MOA, as though set forth fully herein..."). Among these unaltered terms that were incorporated were those provisions related to the longevity increases and the across-the-board increases described above. *See id.* The MOA remained in effect until July 1, 2009. *Id.* After its expiration, no collective bargaining agreement was implemented until the most recent agreement, which ran from April 30, 2011 to April 30, 2013 ("2011 Agreement").

In 2010, the Employer had refused to institute both the longevity increases and across-the-board wage increases established by the 2005 Agreement and incorporated into the MOA. Tr. 269-71. The Employer acknowledged that the Union "challenge[d]" this unilateral cessation of longevity increases. Tr. 270[4] The Employer *did* implement longevity increases in May 2011 once the 2011 Agreement was ratified. *See* Tr. 269-70; Tr. 155:10-23. In sum, the Employer may

[3] In the MOA, the parties also pledged to negotiate a new successor agreement. R. Exh. 8.

[4] It is not clear from the record whether the Employer implemented the longevity increases on or after January 27th, 2011, as there was conflicting testimony on the point. According to Hospital Chief Human Resources Manager Lisa Goble, Tr. 35, the Employer refused to make the pay increases established in the 2005 Agreement and the MOA. *See id.* However, PASNAP Staff Representative Terry Marcavage testified at the hearings before the ALJ that she believed the longevity increases were paid on or after January 27, 2011. Tr. 46. 155:16-19. Marcavage also testified that no nurse complained about failing to receive the longevity increase in 2011, which is a strong indication that the increases went into effect. Tr. 155.:20-23.

in January 2011 have implemented the longevity increases as established in the MOA, and it certainly implemented longevity increases in May 2011

The 2011 Agreement, which covered the period of April 30, 2011 to April 30, 2013[5] called for longevity increases of a very similar nature to those that had existed under the 2005 Agreement. *Compare* GC Exh. 2 *and* R. Exh. 7. In 2012 and 2013, longevity increases were therefore paid. .Both the 2011 and 2005 Agreements grouped nurse cohorts based on experience. For instance, nurses with 0 to 2 years of service fell into the cohort with the lowest minimum wage, nurses with 3 to 4 years of service were members of another cohort whose minimum wages were higher, nurses with 5 to 9 years of service were members of yet an additional cohort whose minimum wage rate was higher than the members of the previous two cohorts, and so on. GC Exh. 2, Appendix A. Thus, the Agreements assigned each cohort its own minimum wage, with nurses in cohorts with greater years of service entitled to higher minimum wage rates than those nurses who were members of less experienced cohorts.[6] *Id.* In the words of the Agreement, "[w]age minimums shall be based upon the employee's length of continuous service." GC Exh. 2, Art. 25, Section 4. Under Article 25, Section 5 of the Agreement, "[s]cale increases according to longevity shall become due only upon January 27th of the year following the employee's anniversary date." *Id.*; Tr. 43. There is no dispute that following the 2011Agreement's expiration on April 30, 2013, after January 27, 2014, the Hospital ceased to grant employees

[5] The Agreement was actually signed on January 12, 2012 but applied retroactively to April 30, 2011. Tr. 47. The substantive terms of the Agreement were implemented via tentative agreement starting April 30, 2011. *Id.* The delay in the official signing stemmed from the parties' need to proof read the contract and adjust the language, as well as a struggle on the part of the Union to find a time when the Employer was available to undertake a final proofreading and actual signing. Tr. 47; Tr. 154 (Terry Marcavage testified: "I had the document ready in two weeks [after the parties finalized the terms on April 30, 2011]. We had difficulty getting [Employer representative] Jim Carmody to meet with us, to proof the contract.").

[6] The complete list of the cohorts is as follows: 0-2 years of service; 3-4 years of service; 5-9 years of service; 10-14 years of service; 15-19 years of service; 20-24 years of service; and 25 or more years of service. GC Exh. 2, Appendix A.

moving from one cohort to another the longevity increases called for in the Agreement. *E.g.*, Tr. 43.

No explicit dates are provided for by these Agreements as to when these longevity increases were to take place. *See* GC Exh. 2, Art. 25, Sections 4-5; Appendix A. The Agreements also provided for separate across-the-board GWIs, in percentage terms which apply to all nurses in the bargaining unit, occur on particular dates as set forth in the Agreement, and were not dependent on years of service. *See* GC Exh. 2, Art. 25, Sections 2-3; Appendix A. Stated otherwise, every nurse in the bargaining unit would on a certain date each year have his or her wage increased by the GWI percentage. The 2011 Agreement, just like the 2005 Agreement, also provided that at the time of ratification all nurses would have their wages increased to a specified minimum, based on their experience cohort, and that those already making above that minimum would maintain that wage until the first across-the-board percentage increase or until thy would, by virtue of their anniversary dates, move to a higher cohort. GC Exh. 2, Art. 25, Section 1.

The Agreements treated the two increases—the longevity increases and the GWIs—as completely separate matters, as evidenced by the fact that the two increases are established in their own distinct sections, Sections 2-3 of Article 25 with respect to the GWI and Sections 4-5 of Article 25 for the longevity increases. Section 5 specifically refers to "[s]cale increases according to longevity" as a distinct category while Sections 2 and 3 make no mention of longevity. *See id.* at Art. 25, Section 2-3, 5. Moreover, while longevity increases become due "upon January 27th of the year following the employee's anniversary date," the GWI became due "the first full pay period *after*" specific dates (e.g., January 27th, 2012). GC Exh. 2. Thus,

while all nurses received the GWI, nurses would only move up in the longevity scale if their anniversary dates moved them from one cohort to another.

After the 2011 Agreement expired on April 30, 2013, the Hospital unilaterally ceased to making longevity increases, not even giving the Union notice or an opportunity to bargain following the expiration of the Agreement. *E.g.*, Tr. 43. Accordingly, on March 5 , 2014, the Union filed the present unfair labor practice charges against the Employer, alleging that the Employer violated Section 8(a)(5) of the Act by refusing to bargain on a mandatory subject of bargaining and Section 8(a)(1) of the Act by notifying the Union and its members that it would cease implementing longevity increases. GC Exh. 1, Complaint, Paragraph 8.

II. STATEMENT OF CASE

On April 23,2014, the Regional Director issued a Consolidated Complaint alleging, *inter alia*, that the Hospital violated Sections 8(a)(1) and 8(a)(5) of the Act when it "ceased making longevity based wage increases to unit employees" without "having afforded the Union the opportunity to bargain...and [] without the Union's consent." *Id.*[7] A hearing was conducted at the offices of the Fourth Region in Philadelphia, Pennsylvania from July 14-16, 2014. At the close of the hearing, the parties agreed to the submission of written briefs in accordance with the Board's Rules and Regulations. Tr. 340-341.

[7] Paragraphs 6 and 7 of the Consolidated Complaint alleged other violations of the Act, specifically interference by the Hospital with the right of PASNAP to handbill in violation of Section 8(a)(1) of the Act and the refusal of the Hospital in violation of Section 8(a)(5) of the Act to provide information at all or in a timely fashion to the Union. However, pursuant to an agreement by the Hospital and PASNAP, PASNAP, on September 8, 2014 filed a Motion with the ALJ to remand Paragraphs 6 and 7 of the Complaint to the Regional Director so the underlying charges with regard to this conduct could be withdrawn. On September 10, 2014, the ALJ upon consideration of the Charging Party's September 8, 2014 Motion, remanded the Consolidated Complaint to the Regional Director, for his approval of rescission of Paragraphs 6 and 7 of the Consolidated Complaint and withdrawal of those aspects of the charges relating to these two Paragraphs. The Regional Director did so after remand to him.

After submission of post-hearing briefs by the parties, the ALJ, on November 17, 2014, issued her PDO. In that PDO, the ALJ found that the Employer unlawfully ceased making longevity increases on January 27, 2014, and therefore violated Sections 8(a)(1) and 8(a)(5) of the Act.(PDO at 10). In making her decision, the ALJ also rejected a pre-hearing Motion, filed by the Hospital, seeking to dismiss the Complaint on the grounds that that the Regional Director lacked authority to issue the Complaint on the grounds that his appointment in January, 2013 occurred during the period between January, 2012 and August, 2013 when the Board had no quorum. (PDO at 6).

III. ISSUES RAISED BY EXCEPTIONS

A. **WHETHER THE ALJ CORRECTLY DECIDED THAT THE REGIONAL DIRECTOR'S APPOINTMENT IN JANUARY, 2013 DURING THE PERIOD WHEN THE BOARD LACKED A QUORUM DID NOT RENDER THE ISSUANCE OF THE COMPLAINT *ULTRA VIRES* AND THUS PROPERLY DENIED THE HOSPITAL'S MOTION TO DISMISS.**

B. **WHETHER THE ALJ WAS CORRECT IN FINDING THAT THE HOSPITAL VIOLATED SECTIONS 8(A)(1) AND 8(A)(5) OF THE ACT WHEN IT UNILATERALLY CEASING LONGEVITY INCREASES ESTABLISHED BY THE AGREEMENT AFTER THE COLLECTIVE BARGAINING AGREEMENT HAD EXPIRED WITHOUT GIVING THE UNION NOTICE OR AN OPPORTUNITY TO BARGAIN.**

C. **WHETHER THE ALJ WAS CORRECT IN FINDING THAT THE HOSPITAL HAD FAILED TO MEET ITS BURDEN OF PROOF WITH RESPECT TO THE HOSPITAL'S AFFIRMATIVE DEFENSE THAT THE UNION HAD WAIVED ITS RIGHT TO BARGAIN OVER THE POST-EXPIRATION CESSATION OF LOGEVITY INCREASES.**

D. WHETHER THE ALJ CORRECLY CONCLUDED THAT EMPLOYER COULD IMPLEMENT LONGEVITY INCREASES IN THE ABSENCE OF ANY AGREEMENT BETWEEN THE PARTIES AS TO ANY GENERAL WAGE INCREASES.

IV. ARGUMENT

A. IN LIGHT OF THE NOVEMBER 29, 2011 DELEGATION BY THE BOARD TO THE GENERAL COUNSEL TO APPOINT REGIONAL DIRECTORS AND ITS JULY 18, 2014 RATIFICATION ON ALL PERSONNEL ACTIONS TAKEN BETWEEN JANUARY 4, 2012 AND AUGUST 5, 2013, THE ALJ CORRECTLY DENIED THE HOSPITAL'S MOTION TO DISMISS THE COMPLAINT.

Attempting to utilize the Supreme Court's decision in *NLRB v. Noel Canning,* 134 S.Ct. 2550, 573 U.S. ___ (2014) for its own devices, the Hospital has urged dismissal of the Complaint on the grounds that the Regional Director, Dennis Walsh, who issued the Complaint, was appointed in January, 2013 and thus his appointment was invalid and the issuance of the Complaint *ultra vires.*

The ALJ first noted that on November 22, 2011 a proper quorum of the Board, without dissent, delegated to the General Counsel, in the absence of a quorum the authority to appoint, *inter alia,* "..any Regional Director..." 76 Fed. Reg 73719 (November 29, 2011). [PDO at 5]. In addition, she noted that on July 18, 2014, a full Board complement, all properly appointed and confirmed, ratified all personnel actions, expressly approving the appointment of Dennis Walsh as Regional Director. [Ib.]. Accordingly, she rejected the Hospital's motion (PDO at 6),

The decision by the ALJ in this matter is consistent with decisions by the Board itself on such contentions with regard to the authority of Regional Directors appointed during the period of January 4, 2012 and August 5, 2013. See, e.g., *Bluefield Hospital Company,* 361 NLRB No. 154 (2014),slip op. at 2 fn. 5; *Fused Solutions, LLC.*, 361 NLRB No. 119, slip op. at 1 fn. 1

(2014). Indeed, the issue of Regional Director Walsh's appointment was expressly considered by the Board in several proceedings. See, e.g., *Pallet Companies, Inc.*, 361 NLRB No. 33, slip op. at 1-2 (2014); *ManorCare of Kingston, PA,* 361 NLRB No. 17, slip op at 1 fn. 1 (2014) Most recently, in *Advanced Disposal Services,* Case No. 04-RC-123739, 2014 WL 7188952), slip op. at 1-2 fn 2 (December 16, 2014) the Board rejected all of the very arguments advanced in its Exceptions by the Hospital. Accordingly, the PDO is consistent with prior rulings and the Hospital's Exceptions here are devoid of merit.

B. THE ALJ WAS CORRECT IN FINDING THAT THE HOSPITAL VIOLATED SECTIONS 8(A)(1) AND 8(A)(5) OF THE ACT WHEN IT UNILATERALLY CEASING LONGEVITY INCREASES ESTABLISHED BY THE AGREEMENT AFTER THE COLLECTIVE BARGAINING AGREEMENT HAD EXPIRED WITHOUT GIVING THE UNION NOTICE OR AN OPPORTUNITY TO BARGAIN.

An employer violates Section 8(a)(5) of the Act if it unilaterally changes conditions of employment under negotiation. *NLRB v. Katz*, 369 U.S. 736, 743 (1962). An employer therefore has a duty to maintain the status quo pending negotiations, and a union has a corresponding right to bargain over any proposed changes to that status quo. *Id.* As found by the ALJ, this duty is statutory in nature (PDO at 7). See, e.g. , *Southwest Ambulance*, 360 NLRB No. 109, slip op. at p. 10 (2014). [8] Moreover, "it is well settled that the unilateral change doctrine...whereby an employer violates the NLRA if it effects a unilateral change of an existing term or condition of

[8] The ALJ correctly found there was nothing in the expired agreement that created a *contractual* obligation to pay longevity step increases after the expiration date. (PDO at 6).

employment, without bargaining to impasse, extends to cases in which an existing agreement has expired and negotiations on a new one are pending." *Id.* at p. 9.

"The Board has recognized longevity pay as a mandatory subject of bargaining." *Id.* at 8. On multiple occasions, the Board has held that "longevity pay…constituted terms and conditions of employment which were clearly mandatory subjects of bargaining." *Id.*; *The Finley Hospital*, 359 NLRB No. 9, slip op. at 4-5 (2012); *Pine Brook Care Center*, 322 NLRB 740, 748 (1996). "Longevity pay" refers to "payment[s] to eligible senior employees" based on accumulated years of service. *Southwest Ambulance*, 360 NLRB at p. 9. It does not matter what an employer calls such payments. *See id.* at pp. 8-9 When a labor agreement provides for pay increases to employees based on years of service, those increases are "clearly [] mandatory subject[s] of bargaining." *Id.* at 8.

Indeed, the Hospital does not contest that the ALJ's determination that longevity pay is a mandatory subject of bargaining (PDO at 7, fn 3, at 10, lines 10-11). Nor does the Hospital assert that the ALJ erred in finding that the Hospital ceased paying longevity increases, a mandatory subject of bargaining, on January 27th, 2014 following the expiration of the 2011 Agreement on April 30th, 2013. (PDO at 4, line 27). Finally, the Hospital does not seriously suggest it provided PASNAP with notice or an opportunity to bargain on the subject, let alone that it negotiated to impasse as to this issue. *E.g.*, Tr. 43.[9] It therefore committed facial violations of Sections 8(a)(1) and 8(a)(5) by its conduct, as found by the ALJ (PDO at 21-24).

[9] The ALJ so concluded. (PDO at 7, lines 16-17).

C. THE ALJ WAS CORRECT IN FINDING THAT THE HOSPITAL HAD FAILED TO MEET ITS BURDEN OF PROOF WITH RESPECT TO THE HOSPITAL'S AFFIRMATIVE DEFENSE THAT THE UNION HAD WAIVED ITS RIGHT TO BARGAIN OVER THE POST-EXPIRATION CESSATION OF LOGEVITY INCREASES.

The Hospital has excepted to the ALJ's finding (PDO at 9, that the Union did not waive its statutory right to insist on bargaining over the decision by the Hospital to cease making longevity-base wage increases. In so doing, the Hospital, in essence, makes a "past practice" argument, asserting there was a past practice by which the Union acquiesced in prior instances in which, after the expiration of a collective bargaining agreement, the Hospital did not move nurses, based on their anniversary dates, from one pay cohort to another.

The Hospital's argument cannot be supported by fact or law. First the Hospital ignores the fact that any waiver thereof cannot be inferred but rather must be "clear and unmistakable." *Metropolitan Edison v. NLRB,* 460 U.S. 693, 708 (1983); *Finley Hospital,* 359 NLRB at p. 2. For a waiver to be "clear and unmistakable" such that the right is waived, "bargaining partners [must] unequivocally and specifically express their mutual intention to permit unilateral employer action with respect to a particular employment term, notwithstanding the statutory duty to bargain that would otherwise apply." *Id.* At p. 2 (quoting *Provena St. Joseph Medical Center*, 350 NLRB 808, 811 (2007)). A union may express such a "clear and unmistakable waiver" either expressly or implicitly. *Southwest Ambulance*, 360 NLRB at p. 9. In assessing whether a clear and unmistakable waiver exists, the Board has considered (1) language in the collective-bargaining agreement; (2) the parties' past dealings; (3) relevant bargaining

history; and (4) other bilateral changes that may shed light on the parties intent. *Southwest Ambulance*, 360 NLRB at p. 9.

Obviously, the collective bargaining agreement contains absolutely no express waiver of the right of the Union to bargain with respect to a decision by the Hospital to terminate longevity pay increases; it would therefore seem foolish for the Hospital to assert that the labor agreement contains such express language. Nonetheless, in what can only be characterized as a form of circular reasoning, the Hospital maintains, that the contract does indeed support the waiver argument by virtue of the language of the longevity clause itself, notwithstanding the specific statement of waiver is nowhere to be found. Stated otherwise, since the purported waiver was not "explicitly stated", such a waiver cannot be inferred. *Metropolitan Edison, supra* at 708.

Reliance by the Hospital on Article 25 and Appendix A of the collective bargaining agreement, devoid as those provisions are of express language giving the Hospital *carte blanche* to suspend or end longevity increases, is misplaced. Whether contractual language constitutes the required "clear and unmistakable" waiver on the part of any union of its statutory right to bargain is whether the language expressly addresses the employer's behavior post-expiration. *Finley*, 359 NLRB at p. 4 (finding a contract is not a waiver because it "does not address any post expiration conduct or obligations of the employer"); *Southwest Ambulance*, 360 NLRB at p. 10 (for a contractual provision to be a waiver, it must "provide[] for…post expiration action or conduct"). Again, language simply limiting the duration of the contract, or limiting a provision to the duration of the contract, does not waive a statutory right to bargain after the expiration date has passed—something far more explicit, clear, and direct is required. In essence, the union must affirmatively state that once the contract has expired, the employer may act unilaterally.

Board decisions in which such post-contract language commands a finding of waiver require explicitness and clarity. *Oak Harbor Freight Lines*, 358 NLRB No. 41 (2012)[10] and *Cauthorne Trucking*, 256 NLRB 721 (1981), *enforced in part,* 691 F.2d 1023 (D.C. Cir. 1982), In these decisions, the contractual language explicitly provided that the employers could act unilaterally with regard to cessation of fringe benefit contributions after the expiration of each relevant contract. However, where language simply limited the applicability of a particular term to the duration of the contract but said nothing expressly about what the employer could do *after* the contract expired, there is no such waiver post-expiration. *Southwest Ambulance, supra; Finley Hospital, supra.* More is needed for a waiver to become "clear and unmistakable."[11]

The language in the 2011 Agreement simply cannot be construed to constitute a "clear and unmistakable" waiver. For example, the longevity increase sections of the 2011 Agreement do not even limit their effectiveness to "the duration of the contract" or similar such language. *See* GC Exh. 2, Art. 25, Section 5 ("Scale increases according to longevity shall become due only on upon January 27th of the year following the employee's anniversary date."). The required explicit grant to the Employer to act unilaterally post-expiration is absolutely nowhere to be found. *See generally*, GC Exh. 2. The only *possible* contractual basis for an "explicit waiver theory" is the "Duration" Article of the Agreement, Article 47. GC Exh. 2. But Article 47 simple states that the Agreement "shall be in full force and effect for the following term

[10] Because of the Supreme Court's decision in *NLRB v. Neol Canning,* 134 NLRB S.Ct. 2550, 573 U.S. ____ (2014), the Board considered anew its holding in *Oak Harbor Freight Lines,* and reaffirmed its earlier findings. 361 NLRB No. 82 (2014).

[11] *Southwest Ambulance* also makes clear that separate provisions of a contract must be treated independently for waiver purposes. 360 NLRB at p. 10. Ergo an agreement which permits unilateral action post-expiration on one term or condition has no bearing on whether it permits unilateral action post-expiration on other provisions. *Id.* Indeed, application of the doctrine of *exclusio unius est inclusio alterius* ("to express one thing is to exclude another") makes evident that if the parties expressly agree to give an employer the untrammeled right to make post contract expiration changes with regard to one matter, logically the employer lacks that right as to other matters for which no such agreement can be found in the language of the agreement.

commencing on April 30, 2011, and terminating at 11:59 p.m. on April 30, 2013." *Id.* There is no mention of the Employer's obligations or behavior post-expiration and thus no basis for the claim by the Hospital that the contract language itself undercuts the ALJ's decision that there was no waiver.

The Hospital, pointing to two prior contracts, suggest that the Union's conduct in after the expiration of the 2005-2009 contract, somehow meets that standard. In so arguing, the Hospital conveniently ignores the extensive number of Board decisions which make clear that "silence in the face of past unilateral changes does not constitute waiver of the right to bargain." *E.g., DuPont*, 355 NLRB at p. 2, n. 5; *Provena St. Joseph Medical Center*, 350 NLRB 808, 815 n. 35 (2007); *Amoco Chemical Co.*, 328 NLRB 1220, 1222, n. 6 (1999); *Exxon Research and Engineering Co.*, 317 NLRB 675, 685-686 (1995); *Owens-Corning Fiberglass*, 282 NLRB 609 (1987).

The Hospital however, in attempting to find some basis for challenging the ALJ's decision, points to events in 2010 when the Hospital apparently engaged in conduct similar to that at issue in this matter, PASNAP filed a charge of unfair labor practices and the RD declined to issue a complaint.[12] The Hospital, in its Exceptions, attempts to imbue these events with some sort of legal significance, clearly an argument, as noted by the ALJ (PDO 9, lines 10-11) that is bereft of precedential value. See, e.g., *Ball Corporation,* 322 NLRB 948, 951 (1997)["Regional Director's administrative dismissal or refusal to proceed on a charge is not a adjudication on the merits..."]; *B. A. F. Inc.,* 302 NLRB 188, 193 (1991), *enf'd.* 953 F.2d 1384 (6 Cir. 1992);*Kelly's Private Car Service,* 289 NLRB 30, 39 (`1988), *enf'd.* 919 F.2d 839 (2d

[12] No documentary evidence was offered as to the charge or the decision by the RD not to issue a complaint. But the ALJ did find that this occurred. (PDO at 9, lines 9-11)

Cir. 1990). Moreover, the point that the Hospital is attempting to make however undercuts its attempt to argue that there is a past practice.

In *Courier-Journal*, 342 NLRB 1093, 1094 (2004), the Board held that for unilateral employer change to rise to the level of the status quo, there must be a "longstanding" past practice of such changes. Indeed, as the Board emphasized in *Courier-Journal*, the employer there made unilateral changes both while contracts were in place and during interim periods. *Id.* It also emphasized that the Employer had "regularly made unilateral changes" on the particular subject at issue for ten years without any protest from the union. *Id.* This decade-long, frequent, and unchallenged practice of unilateral employer change rose to the level of the status quo, such that the employer there did not violate the Act when it continued it. *See id.*

It is quite evident that there is hardly a past practice of unilateral Hospital cessation of longevity increases. But even assuming, purely for the sake of argument, that there was an one instance of Union acquiescence to the cessation of payment of longevity increases, what happened in the Hospital-PASNAP bargaining relationship not even come close to being sufficiently "longstanding" to render it the status quo under for purposes of the *Courier-Journal* doctrine. Moreover, the fact that the Union *did* challenge such conduct in 2010, a point made emphatically by the *Hospital* in what can only be characterized as willful misreading of the law governing the legal impact of decisions by Regional Directors declining to issue complaints, makes quite evident that there was not silent acquiescence over a period of many years to unilateral cessation of longevity increases. Stated otherwise, the Hospital cannot have it both ways: it cannot argue on the one hand that there was silence by the Union to unilateral termination of longevity increases but then point to a Union protest to suggest, however

erroneously, that the administrative rejection of that protest supports the right of the Hospital in 2014 to cease longevity increases.

Thus, the Hospital can only demonstrate there to have been one possible instance of an unchallenged unilateral cessation—January 2011—and it may well have been that that unilateral cessation was rectified in negotiations for the May 2011 longevity increases.[13] This one disputed instance of unilateral employer cessation, which may have been rectified five months later, does not come anywhere near establishing a "status quo" of unilateral action under *Courier-Journal.*

D. THE ALJ CORRECLY CONCLUDED THAT EMPLOYER COULD IMPLEMENT LONGEVITY INCREASES IN THE ABSENCE OF ANY AGREEMENT BETWEEN THE PARTIES WITH REGARD TO A FUTURE GENERAL WAGE INCREASE.

The Hospital has contended that the application of the system of longevity-based wage rates could only take place in the context of an agreed-upon general wage increase ("GWI"). IN other words, the Hospital has also offered as a defense the assertion that it could not have moved any nurse whose years of service would place her in a grade with a higher hourly rate unless it also had agreed with the Union as to the GWI to be applicable in 2014. The Hospital so posits in order to establish what it purports to be a "past practice" in order to support its assertion that the Union waived its right to bargain with respect to the Hospital's decision to cease making longevity wage adjustments.

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[13] Obviously, if the Hospital took unilateral action in January, 2011, the successful negotiations for a 2011 Agreement occurred *during* the Section 10(b) period. Had the negotiations broken down, the Union could have filed charges of unfair labor practices; obviously the successful negotiations obviated the need for the Union to take such action.

The ALJ, in her PDO, thoroughly demolished the Hospital's position about the purported dependent relationship between the GWI and longevity increases. (PDO at 9-10).[14] Nonetheless, the Hospital continues to advance the argument that the two provisions, for a GWI and a longevity matrix, are interconnected. Some exposition of the manner in which the system operated is therefore warranted.

Article 25 of the Agreement established two distinct categories of pay increase—longevity increases and across-the-board, or GWIs. GC Exh. 2. Thus, a table in Appendix A (the "Scale") establishes employees' minimum pay, with "[w]age minimums [being] based upon the employee's length of continuous service." *Id.* at Art. 25, Section 4; Appendix A. The Scale encompasses both kinds of increase. For the GWI, the Scale provides for a raise of 2.75% from the previous minimum for *all employees across all experience cohorts* in January 2012, and a 2% raise from that minimum for all employees across all experience cohorts in January 2013. This increase runs horizontally within the Scale.

The Scale also provides for the longevity increase, which runs vertically. As an employee accumulates experience and moves from one cohort to another, she moves vertically down the scale and is entitled to a new, higher minimum. The two kinds of raises operate independently of one another. The GWIs occur at the specified time, and all nurses moves to the right on the matrix. The longevity increases occur on an individual employee level, with each employee moving down on "January 27th of the year following the employee's anniversary date." GC Exh. 2, Art. 25, Section 5.

The first five sections of Article 25 of the 2011 Agreement explain how the two increases work, with Section 2-3 covering the general increases and Sections 4-5 covering the longevity

[14] The actual longevity structure, with an explanation as to how it functioned, is set forth at page 4 of the PDO.

increases. Analysis of these provisions make their meaning, and the simple increases they establish, quite clear. Section 1 provides that in May 2011, all employees making below the May 2011 figure in Appendix A will be raised to that figure. Employees making above that scale will continue to earn their above-scale wages. As Section 4 specifies, *which* wage minimum an employee would be guaranteed in May 2011 is "based upon the employee's length of continuous service." So, for example, an acute care worker with one year of experience would be guaranteed $24.90 an hour in May 2011. GC Exh. 2, Appendix A.

Section 2 provides that in the first full pay period after January 27, 2012, all employees will make at least the minimum figure provided in the second column in Appendix A under "January 2012," with each person's precise minimum determined by her experience cohort. *Id.* But those nurses who were making above the May 2011 minimum in that month maintain their above-minimum rates. They, like their colleagues making the minimum for their experience cohort, receive a 2.75% increase from whatever their wages were to be in January 2012. Under the language of Section 2, therefore, *everyone gets the same percentage increase*—namely, 2.75%. It is a *general* 2.75% wage increase applying to all employees. Section 3 simply does the same thing over again, except it calls for a uniform 2% increase in the first pay period after January 27, 2013. Again, *every nurse* received a 2% increase, both those making the minimum for their cohort and those who were earning above the minimum. Meanwhile, independently, individual employees are moving through the Scale and thus earning higher wages as they accumulate years of service and thus are entitled to move to a higher experience cohort. *Id.*

Simply put, the 2011 Agreement granted all employees the same percentage raise in January 2012 and January 2013. *Id.* at Sections 2-3; Appendix A. These increases occur after every nurse's hourly wage rate one is increased to a minimum established by their experience

cohort in May 2011. *Id.* at Section 1. Those already above the minimum in a particular cohort are not brought back down to that minimum —they retain their higher salaries. *Id.* at Sections 1-3. Independently, individual employees move to new, higher minimums based on accumulated service. *Id.* at Sections 4-5; Appendix A.

An employee who was making above the minimum wage rate for a less experienced cohort graduates to a more experienced cohort and thus receives a longevity increase to the new cohort minimum. *See id.* The same is true for an individual making the minimum for a less experienced cohort who moves into a more experienced cohort. *See id.* If a nurse advances to a new, more highly compensated cohort and receives the GWI in the same year, the Agreement plainly tells explains what is to be done. The longevity increase becomes due "upon January 27th of the year following the employee's anniversary date." GC Exh. 2. The GWIs are "[e]ffective the first full pay period after January 27" of either 2012 or 2013. Therefore, a nurse who reaches three years of service and so moves into a new cohort in 2011 is officially part of that cohort *on January 27*. She would move down the Scale on that precise day. Then, she receives a general wage increase in the next full pay period, per Section 2, and will get a 2.75% increase from the 3-4 experience cohort minimum from May 2011. That is, she first moves down, then moves over, exactly as the Agreement instructs.

In sum, under the 2011 Agreement, all employees in the unit get percentage raises at the same two fixed dates—January 2012 and January 2013. Independent of this, each individual gets a separate raise when she accumulates enough years of service to move down the Scale into a new experience cohort. This intuitive, common sense system, in which the longer a nurse has worked, the higher the wage rate she will be paid, and in which all bargaining unit employees receive the same percentage wage increases at the same times, resembles in form that in found in

countless other collective bargaining agreements for time immemorial and in a variety of industries.

The Hospital can point to no contractual language of any kind that would remotely support its construction of the 2011 Agreement. One simply cannot bridge the divide between the Employer's interpretation of the 2011 Agreement and the actual words thereof. Indeed, the Hospital's interpretation seems to be totally disembodied from the 2011 Agreement itself. Implicit in its fantastical interpretation is the Hospital's idea that an employee gets either the general wage increase or the longevity increase, but not both. This interpretation hinges on the idea that "to the wage scale" refers to the *vertical* movement of the *longevity* increase, and not the *horizontal* movement of the *general* wage increase. But it takes a great deal of strenuous effort to read the sentence this way. When the Agreement refers to the longevity increase elsewhere, it uses the phrase "[s]cale increases according to longevity," not the phrase increases "to the wage scale." The word "longevity" does not appear in Sections 2-3. Surely the Agreement would not use different words for the same thing within sentences of one another.

All the Hospital needed to do to meet its bargaining obligation was to look to Appendix A and as a nurse accumulates years of service, the Hospital moves that nurse down the column and pay her the minimum specified for her years of service. Horizontal movement ceases, but vertical movement continues exactly as before and exactly as specified in the Agreement.

V. CONCLUSION

Based on the arguments advanced above, the Respondent's Exceptions should be dismissed and the ALJ's Proposed Decision and Order adopted in its entirety.

Respectfully submitted,

MARKOWITZ & RICHMAN

BY: _____

Jonathan Walters, Esquire
123 S. Broad Street, Suite 2020
Philadelphia, PA 19109
Telephone: (215) 875-3121
Telefax: (215) 790-0668
Email: jwalters@markowitzandrichman.com
Counsel for Charging Party

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CERTIFICATE OF SERVICE

I, Jonathan Walters, hereby certify that copies of the foregoing Brief of Charging Party In Opposition to Employer's Exceptions were served this date by electronic mail upon:

Dennis Walsh, Regional Director.
National Labor Relations Board, Region 4
615 Chestnut Street
Philadelphia, PA 19106
Dennis.Walsh@ nlrb.gov

Henry R. Protas, Esq.
National Labor Relations Board, Region 4
615 Chestnut Street
Philadelphia, PA 19106
Henry.Protas@ nlrb.gov

Carmen M. DiRienzo, Esq.
4 Honey Hollow Court
Katonah, NY 10536
(917) 217-4691
Carmen.DiRienzo@hotmail.com

JONATHAN WALTERS, ESQUIRE
Attorney for Charging Party

Dated: 22 January 2015